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1946-1947

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President's Page

THIS is written on the eve of my departure for the Mid-Winter Meeting of our Executive Committee. Many matters pertaining to future activities of our Association are on the agenda for consideration by the Committee. All members of the Committee are planning to attend.

The personnel of the various standing committees for the year are listed elsewhere in this issue of the Journal. I have counseled with numerous members of the Association as to these appointments and have received invaluable assistance from the members of the Executive Committee. It is my hope that by associating members previously inexperienced in committee work with those who are old hands at the business we may broaden the interest in the affairs of the Association. Each member of the Executive Committee, in addition to his other duties, has graciously agreed to accept a position as ex-officio member of one of the standing committees. This will provide a tie among the various standing committees, which, I am sure, will facilitate their work.

It is to be noted that the Executive Committee discontinued the committee on Unauthorized Practice of Law, and requested that I appoint a new standing committee on Automobile Law. I have not yet appointed a Legislative Committee or a General Legislative Chairman, this being a matter which I desire to take up with the Executive Committee at the Mid-Winter Meeting.

The time and place of our next Annual Convention will be selected by the Executive Committee at the Mid-Winter Meeting. Our favorite haunt, the Greenbrier at White Sulphur Springs, West Virginia, is still unavailable for conventions. I have been informed that it is not taking any reservations until 1948. It is imperative that we convene early in September at some place able to accommodate at least 500 people. Present indications point to The Claridge at Atlantic City. The Association was organized at Atlantic City in September, 1920, and it might be appropriate to return to our birthplace. More as to that later.

PAUL J. MCGOUGH,
President.

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Chairman: Guillermo Diaz Romanach, The Trust Company Building, Havana, Cuba, Obispo No. 53.

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Chairman: Charles E. Ramirez, 6 Tivoli Avenue, P. O. Box 124, Ancon, Canal Zone.

Greetings Extended by Paul J. McGough, President of The International Association of Insurance Counsel to Insurance Section of American Bar Association 1946 Annual Meeting, Atlantic City, New Jersey

I AM very pleased to appear before you on behalf of the International Association of Insurance Counsel and deeply appreciate this opportunity to greet you. As I look about this room and note the many familiar faces of men with whom I have been associated for many years, both in the work of this Insurance Section and in the Insurance Counsel Association, I am reminded of the numerous and close ties which have existed through the years between these two groups. With so many ties of mutual interest it is with the sincerest pleasure that I extend to you the greetings of our Association.

Both this group and the Insurance Counsel group owe their existence to the growing importance—and growing complexity—of insurance and insurance law.

The International Association of Insurace Counsel was founded in 1920 and includes in its membership attorneys not only of the United States but of our sister countries of Canada, Mexico, Hawaii, Cuba and the Canal Zone. Through the quarter century of its existence our Association has seen insurance become increasingly important not only to business generally but to practically every individual. During that time our Association has had under consideration many subjects of vital interest in the field of insurance law, and we feel that through the free interchange of suggestions and ideas in committee work and otherwise we have better qualified ourselves to serve our insurance clients. As you know, our members have written many articles on matters of current interest in the field of insurance law which have been published in our quarterly publication, The Insurance Counsel Journal. I know that each and every one of you will be most interested in hearing that through the generosity of the West Publishing Company a Cumulative Index to the articles which have appeared in our Journal for the past 18 years is now being prepared. This index, I am sure, will prove to be of immeasurable value as a working tool to the insurance world, and to lawyers and others who are faced with problems in this field. This Cumulative Index will soon be available to the membership, and I think all of you will be most interested in examining it when it comes off the press.

It was 13 years ago that the American Bar Association came to the conclusion that the problems of insurance law had become of

such wide interest and so varied and complex that it called for the formation of a separate new Section in Insurance Law. The correctness of this conclusion was immediately evident. The newly formed Section became from the very start one of the largest Sections of the American Bar Association. Today it has about 3,250 members. The outstanding contributions which this Section has made are well known. I am very proud to have been a member of the Section since its inception.

This Insurance Section and our Insurance Counsels Association are supporting arms of one of America's great industries—the insurance industry. Both organizations fill a definite need and both organizations have attained importance and influence. These two organizations provide a forum where lawyers can discuss and work out their common problems in the field of insurance law. The splendid results accomplished in the past attest to what can be accomplished in the future through the continued cooperation and active participation of all who are interested in insurance law.

Journal Cumulative Index

IN THE PAST in the January issue of Insurance Counsel Journal an index to articles and reports has been published. Your President, Paul McGough, last year contacted friends with the West Publishing Company relative to reviewing articles and reports appearing in the Journals and Year Books and the last published index with reference to compiling a new cumulative index.

I am pleased to announce that the West Publishing Company has as a courtesy to the Association made up an entirely new cumulative index and has sent to me cards from which a new index is to be made. These cards have been received and checked and delivered to the printer. Your President has suggested, and I concur in his suggestion, that this index be not included in the January issue of the Journal, but be published as a separate volume, and that a different color cover be used in order that this index issue be easily distinguished from the regular issue of the Journal.

I am sure you will await receipt of this excellently prepared cumulative index with interest and will find it of great assistance in locating articles and reports heretofore appearing in the Journals and Year Books.

War And Aviation Clauses In Life Insurance Policies*

By Paul E. Price
Chicago 2, Illinois

THE subject of this paper was, as your notice of the meeting indicated, originally assigned to Clarence Heyl who demonstrated his thorough familiarity with the subject matter by successfully selling his theory of the meaning of an aviation exclusion clause to a majority of the Circuit Court of Appeals for the Seventh Circuit in *Bull vs. Sun Life Assurance Company*, 141 Fed. 2nd 456. I can think of no good reason why I should be deemed qualified to fill the shoes of a man who has already demonstrated that he is an authority upon the subject, unless our Chairman thought that, because at the Peoria meeting I had made the offhand remark that I had a claim involving the construction of a war exclusion clause, it might be at least educational to me to collate some of the pertinent decisions which might tend to show the trend of judicial thought upon this subject. Hence, it is with some temerity upon my part that I enter upon the discussion of this subject.

Much of the law relating to the construction to be placed upon such exclu-

*A paper read before the section of Insurance Law, Illinois State Bar Association, March 20, 1946.

sionary clauses was developed during or immediately following the conclusion of what is now called World War I. In a paper read before the Association of Life Insurance Counsel on December 4, 1918 by Eugene J. McGivney, General Counsel of the Pan-American Life Insurance Company, he stated that he had "searched the reports of decisions of Courts industriously and I have communicated with general counsel of a number of companies in an effort to locate some judicial construction of the military and naval service clauses. My efforts were not rewarded with valuable results. The decisions upon the subject were few and none that could be considered directly in point." Since the rendition of Mr. McGivney's paper in 1918, to use a current expression, "time has marched on" and today there is not only no paucity of decisions upon this subject but on the contrary, there has been such a host of decisions that an analysis of them discloses that they appear to follow a rather clearly marked pattern.

While the validity of a provision in a life or accident policy or fraternal benefit certificate releasing the insurer from or in some way restricting its liability under the policy because of the connection of the insured with military or naval services or because of his entry into military or naval service, is almost unanimously recognized, yet I assume that it is hardly necessary to observe that such provision if ambiguous or of doubtful meaning, will be construed against the assurer and will be liberally construed in favor of the insured. [*Miller vs. Illinois Bankers Life Association,* 212 S.W. 310 (Ark.); *Railey vs. U. S. L. & A. Insurance Company,* 106 S.E. 203 (Ga.); *Swanson vs. Prov. Insurance Company,* 188 N.W. 677 (Iowa); *Ruddock vs. Detroit Life Insurance Company,* 177 N.W. 242; *Reed vs. American National Insurance Company,* 218 S.W. 957; *Long vs. St. Joseph's Life Insurance Company,* 225 S.W. 106 (Mo.)].

While of necessity, the decisions of Courts vary with the language employed, yet for the most part they may roughly be said to fall into two general lines.

In one line of cases the language generally used in defining the exemption from liability is that at the time of death the insured shall have been "engaged in military service." In some of these cases other language may be used but it must have the same effect, that of requiring that the death must have been suffered in the course of actual military activity. Therefore, the decisions on this line are generally to the effect that exemption of the insurer from liability arises only where a "causal relation" is shown to exist between the military service and the death.

In the other line of cases the language generally used in defining such exemption is that "death shall not have resulted from bodily injuries sustained while the insured is in the military or naval service in time of war." Generally the decisions hold that in the case of contracts using this language the exemption arises from the status of one inducted into the military service and not yet discharged therefrom at the time of his death. It does not depend upon any causal connection between the death and any form of military activity.

Typical of the line of cases first mentioned above and using the term "engaged in military service" is that of Benham v. American Central Life Insurance Company (Ark.) 217 S.W. 462. Note the crystal clear language of the court in interpreting the meaning of the policy provision thereunder consideration, "death while engaged in military service in time of war." The court said:

> "The words in the restricted clause now under consideration mean something more than death to the insured during the period of time he was in military service of the United States. The word 'engaged' denotes action. It means to take part in. To illustrate, a servant injured while in the operation of a train means that he must be injured while assisting or taking part in the operation of the train. An officer engaged in the discharge of the duties of his office is one performing the duties of his office. So here the words, 'death while engaged in military service in time of war' means death while doing, performing, or taking part in some military service in time of war; in other words, it must be death caused by performing some duty in the military service. That is to say, in order to exempt the company from liability, the death must have been caused while the insured was doing something connected with the military service, in contradistinction to death while in the serv-

ice due to causes entirely or wholly unconnected with such service. This construction, we think, would be according to the natural and ordinary meaning of the words. By the use of the word 'engage' it must have been intended that some activity in the service should have caused the death, in contradistinction to merely a period of time while the insured was in the service."

Another case, Long v. St. Joseph's Life Insurance Co., 225 S.W. 106 (Mo.), clearly recognizes the distinction between "while engaged in military service" and "while the insured is in the military service in time of war." The insured enlisted in the Naval Reserve in 1918 and trained for actual participation in hostilities of war. On November 25, 1918 he was granted a furlough and went to his home in Missouri and there died from influenza. The application signed by the insured contained the following provision:

"It is hereby understood and agreed . . . that, in case of my death while engaged in any military or naval service in time of war, to accept in full settlement of this policy the total premiums paid to the Company with 5 per cent interest added for the time the Company has had the use of my money."

The policy provided:

"Provided, however, that it is expressly understood and agreed that, in case of the death of the insured while engaged in any military or naval service in time of war, the beneficiary or beneficiaries hereunder shall accept, in full settlement of this policy a sum equal to the total premiums paid by the insured, etc."

The Court, in permitting recovery, said:

"Now, if it was desired to express one thought that liability would be reduced if death occurred at any time during the period of insured's service, from the date of entrance therein to down to the date of his discharge, why was the word 'engaged' used? If insured's mere status of being an enlisted soldier or sailor at the time of his death is to give effect to the clause and reduce liability, what necessity existed for saying therein that death must occur while insured is 'engaged' in any such service? The usual and ordinary, if not the universal, way of expressing a man's status in that regard, where no idea or thought of what he is doing therein is intended, is to say that he 'is in the service,' not that he 'is engaged in the service.' . . . If the clause in the insurance contract before us means what appellant contends it does, why was it not made to read 'in case of the death of the insured while in the service' etc? Had it said this, or had it read that if insured died 'after having entered the military service or naval service and before his discharge therefrom, 'there could be no doubt but that the clause had reference to the period of insured's service or his mere status in that regard. But, instead of doing this, it says 'in case of insured's death while engaged in any military or naval service.' The word 'engaged' has various meanings according to the subject matter to which it is applied or the connection in which it is used. As applied to military or naval service, the word 'engaged' denotes action or participation in something being done in that service." . . .

Typical of the other line of cases where the exempting provision denotes status rather than causal connection between death in military service or actual participation in military service, is the often cited case of Miller v. Illinois Bankers' Life Association, 212 S.W. 310 (Ark.). The clause in the insurance contract in this case, with reference to the effect of military service, was as follows:

"It is expressly provided that death while in the service of the Army or Navy of the Government in time of war is not a risk at any time during the continuation or reinstatement of this policy for any greater sum than the amounts actually paid to the Company thereon."

The insured was inducted into the military service. He died of pneumonia in camp after his induction. In the opinion the following language is found:

"An insurance company has the right to select the particular risk it is willing to assume and there is no public policy against a contract of this sort exempting

the insurance company in advance from liability for death of the insured while in the military or naval service of the Government."

And further:

"There was no forfeiture provided for at all, but the company had, as above stated, the right to stipulate under what circumstances it should be liable. The assured had the right to pay the premium and continue the policy in force while he was in the military service of the government, notwithstanding the exemption of the company from liability 'for death occurring during the period of that service'."

In determining that the status of the assured was the controlling element, the Court said:

"The death of the assured occurred while he was in the military service of this Government during the period of the war with the Central Powers of Europe."

The language was held to have created a status.

This principle is enunciated in many cases.

Bending v. Metropolitan Life Insurance Co., 58 N.E. 2nd 71 (Ohio). Robert L. Bending was inducted into the military service of the United States. He carried an accident insurance policy with the Metropolitan. The policy in question was issued as a supplemental contract to a standard life policy for $1,000 which was issued at the same time, which contained no military clause and the proceeds of which were paid by the defendant company to the beneficiary. The provision in the supplemental contract was as follows:

"The Company hereby agrees to pay . . . provided . . . that death shall not have resulted from bodily injuries sustained while participating in aviation . . . nor sustained while the insured is in the military or naval service in time of war."

It provided further that the supplemental contract should be suspended while the insured was in the military or naval service in time of war.

In June, 1943, Bending was stationed at Fort Bliss, Texas. He obtained a leave of absence and while at a hotel in El Paso was accidentally killed by falling out of a window. The defendant declined liability, setting up the military exemption clauses as a complete bar to recovery. The trial court found that there was no right of recovery although it was argued that one is not in military service while on leave of absence. The court said:

"One is in the military service from the time he takes the oath until he receives his discharge, honorable or otherwise."

The court held:

"A provision of an accident policy that insurance should be suspended while insured was 'in the military service in time of war, 'made status and not activities of insured in military service ground of exemption from liability, and insurer was not liable for accidental death of insured soldier while on two-day leave of absence, since one is in military service from time he takes the oath until discharge."

Life and Casualty Insurance Co. v. McLeod, 27 S.E. 2nd 871 (Ga.). The insured, James L. McLeod, after the issuance of a policy containing double indemnity provision, entered the naval service of the United States while the United States of America was in actual war with Germany and other Axis powers. The accidental death benefit feature of the policy provided, among other things:

"Nor if death is caused or contributed to directly or indirectly or wholly or partially by disease or by bodily or mental infirmity nor if death result from bodily injuries sustained while participating in aviation or aeronautics, as a passenger or otherwise, or while insured is in the military or naval service in time of war."

In December, 1942, the insured had a personal encounter with another, during which encounter he was fatally stabbed and died from his wounds the next day. At the time of McLeod's death he was not on active duty but was visiting his parents in Georgia while on leave or furlough from the United States Navy and the personal

encounter resulting in his death did not grow out of or happen in connection with any duty then being performed by him in the United States Navy. In this case the court held that the plaintiff beneficiary was only entitled to recover the net reserve of the policy because of the language of the provision exempting the company from other liability beyond the net reserve.

In the case in which Mr. Heyl was interested, Bull v. Sun Life Assurance Co. of Canada, 141 F. 2nd 456 (7th C.C.A.) the insured, Richard Bull, made application for a policy while a naval aviation cadet in training at Pensacola, Florida. The insurance company, knowing these facts, required Bull to sign an endorsement containing the aviation provision and to agee that this provision should become a part of the contract of insurance. The policy provided:

> "Death as a result, directly or indirectly, of service, travel, or flight in any species of aircraft, as a passenger or otherwise, is a risk not assumed under this policy."

On February 5, 1942, Bull, then a Lieutenant (jg) in the United States Naval Reserve, was pilot of a seaplane engaged in routine patrol duty in the South Pacific. While bombing Jap ships at anchor off the Dutch East Indies, the plane was disabled by anti-aircrift fire and fire from Jap Zeros. Bull was forced to make a landing on the water about 1,000 yards from the island of Amboina. The plane did not crash but after landing it could not have flown again without repairs. Members of the crew, to escape a Jap strafing plane, dived into the water. Bull was last seen on the wing of the disabled plane, trying to launch a rubber boat. The first strafing attack was not successful and the Jap returned for a second attack. The members of the crew who had already gone into the water last saw Bull on the tip of the wing as the Jap plane moved in for the second attack. These men were submerged in the water to escape the fire and upon coming to the surface, Lieutenant Bull was not seen again by them and the plane was gone.

The question presented was: "Did Lieutenant Bull meet his death as a result, directly or indirectly, of service, travel or flight in the seaplane?"

There was no war clause inserted in the policy. The court, in affirming judgment for the beneficiary, said:

> "We hold that disengagement from service, travel, and flight in that seaplane had taken place in the case at bar, and that Lieutenant Bull's death had no connection, directly or indirectly, with service, travel, or flight in that seaplane within the meaning of the policy. . . . We think the true intent of the parties was to exclude the risks of aviation and to include the risks of war. The death in this case was due solely to dangers inherent in a war risk."

There was a strong dissenting opinion in the Bull case by Judge Major who, among other things said:

> "The oft repeated adage that a hard case makes bad law receives renewed impetus from the majority opinion. The exclusion clause is written in plain and unambiguous language. Even the able counsel who represents the plaintiff does not contend to the contrary. This being so, there is no room for construction. The situation merely requires a determination as to whether the exclusion clause is applicable to the facts. • • •
>
> "The result reached by the majority ignores the realities of the situation. The insured, together with other members of the crew in performance of a war duty, sought the enemy and engaged in aerial combat in which the seaplane was disabled and forced down. This was an ordinary and known danger incident thereto. Within a few minutes the same enemy, in continuation of such combat, again attacked the plane in its disabled condition, during which attack the insured was killed. In my view, there is no escape from the conclusion that death under such circumstances was the result 'directly or indirectly' of the flight which had been so shortly and suddenly terminated. It is no answer to say that the exclusion clause is inapplicable because the immediate or proximate cause of death was the Japanese attack. Such answer certainly eliminates the word 'indirectly' and perhaps the word 'directly'."

Judge Major's dissenting opinion in the Bull case reviews many decisions decided

by Courts throughout the country in which comparable clauses have received different treatment from the Courts who were confronted by such claims and it might be helpful to give some consideration to the cases which Judge Major thought tended to require a different result than that reached by the majority.

In Judge Major's review of cases thought to be applicable, we read:

> In the Neel case, liability was excluded where "death resulted from * * * * participation in aeronautics." The insured, a pilot, landed his plane in the Atlantic Ocean where his body was found sixteen days later, floating in the water. It was shown that death was caused by drowning. The court, in holding that death resulted from participation in aeronautics, stated:
>
> "It would not have occurred when it did if he had not taken the flight in the aeroplane, and liability for death resulting from such a flight was exactly what was excepted from the coverage of the policy. In other words, the flight, and not the drowning, was the predominant cause of death."

So in the instant case death resulted from the flight and it is of no consequence that it occurred subsequent to the landing of the plane on the water. Unless the parties intended to exclude liability under such circumstances, the clause is meaningless.

In the Pittman case, the exclusion clause was similar to that in the Neel case. There, the insured, while on the ground after the plane had landed and while ostensibly on the way to his parked automobile, was struck by the plane's propeller and killed. The court, in holding that death resulted from participation in aeronautical activity, on Page 371 of 17 F. 2nd stated:

> "The aeronautic activities of one who takes such a trip do not begin or end with the actual flight, but include his presence or movements in or near to the machine incidental to beginning or concluding the trip. * * * We are of the opinion that his presence at the place where he was killed was so immediately connected with and incidental to the airplane trip he took as to require the conclusion that his death occurred while he was participating in an aeronautic activity."

It will be noted that the holding of the majority in the instant case that flight ended when the plane landed on the water is squarely in conflict with the holding in the Pittman case. Also, that case furnishes strong support for defendant's contention that death resulted from flight, etc., within the language of the exclusion clause.

In the Wendorff case, the Supreme Court of Missouri went even further in applying a similar exclusion clause in an accident policy. The court stated (page 102 of 1 S.W. 2nd):

> "In the same way, if a flight is interrupted by mechanical trouble necessitating an involuntary, or forced landing, the interval during which the craft is supported by the watery element instead of the air is as much a part of the flying trip as any other. We are clearly of the opinion that the clause in controversy applies to aircraft in the situation shown to have existed in this case."

Here is another case in conflict with the view that the landing of the plane on the water ended the flight.

In the Blonski case, the Supreme Court of Wisconsin decided that the insured was "engaging or participating * * * in aviation * * *," within the meaning of an exclusion clause. In this case, the insured was struck by the propeller of a plane, which he was spinning for the purpose of starting the motor. The court, in deciding that he was participating in aviation within the meaning of the exclusion clause, quoted from the Pittman case, supra, to the effect that aeronautic activities "do not begin or end with the actual flight, but include his presence or movements in or near to the machine incidental to beginning or concluding the trip." So here is another court which, by implication at least, has held contrary to the majority view.

If there be any room for escape, however, from a holding that death resulted directly from flight, etc., there remains to be considered the word "indirectly." So far as I can gather from the opinion, this word is eliminated on the theory that the parties could not have intended its ordinary meaning. There is a long line of cases, however,

where the courts have not felt so free to disregard a word of such common usage in contracts and other instruments.

In Baker and Conrad, Inc. vs. Chicago Heights Construction Co., 364 Ill. 386, on page 394, 4 N.E. 2nd 953, on page 958, the court stated:

> "The word 'indirectly,' used in the section, cannot be ignored. It obviously was used advisedly from the fact that it occurs in the prose 'directly or indirectly'."

In Feehrer et al vs. Fidelity and Casualty Co., 188 Ill. App. 398, the court considered a provision in a plate glass policy that excluded liability for loss resulting directly or indirectly from inundation. Parties rowing a boat while the street was filled with water collided with the plate glass and broke it. The court, contrary to plaintiff's contention, held that such collision was the indirect result of the inundation. The court stated (188 Ill. App. at page 402):

> "A result may indirectly follow from certain acts or conditions without being the proximate cause, yet they are or may be the indirect results."

In Amicable Life Insurance Co. vs. O'Reilly, Tx. Civ. App., 97 S.W. 2nd 246, 247, the court had before it an insurance contract which excluded liability if "death resulted, directly or indirectly * * * from police duty in any * * * police organization." The insured was chief of police, and in the performance of his official duties arrested one Eskridge for carrying a pistol. The latter was released, and at a later date, without either word or provocation and without the insured being aware of his presence, shot and killed the insured. The question before the court was the meaning of the words "directly (and) indirectly." The court held that the insured's death did not result directly from police duty but that "the word 'indirectly' cannot be treated as surplusage; this word must be given its meaning recognized in the adjudicated cases." The court concluded that the insured's death was the indirect result of police duty.

In Runyon v. Western & Southern Life Insurance Co., 48 Ohio App. 251, 192 N.E. 882, 883, an insurance contract relieved the insurer from liability where death resulted "directly or indirectly, from violation of law by the insured." The insured was found guilty of a violation of law and was confined in the Ohio penitentiary. While so confined, he died as a result of burns received in a fire at the penitentiary. In a suit upon the insurance contract, the court sustained defendant's contention that death was due indirectly to a violation of law. The reviewing court agreed with plaintiff's contention that the fire was the proximate cause of the insured's death, but nevertheless held that the indirect cause of his death was his unlawful act which caused him to be confined in the penitentiary, and that by the terms of the policy recovery was precluded.

In Szymanska v. Equitable Life Insurance Co., 7 W.W. Harr., Del., 272, 183 A. 309, the word "indirectly" contained in an exclusion clause of an insurance contract was construed in the same manner as in the Runyon case.

Another pertinent case is Coxe v. Employers Liability Assurance Corp., 1916, 2K. B. 629. There, the insurance policy sued on provided that it did not insure against death "directly or indirectly caused by * * * war." The insured, a soldier, while in the course of his military duty, was walking through a railroad yard for the purpose of visiting guards and sentries posted at various points along the line. He was accidentally killed by a train. Upon suit by the beneficiary, it was contended by the defendant that the insured's death was either directly or indirectly caused by war. The court so decided.

This paper has already grown to greater length than I had originally intended and I might suggest for those who desire to pursue the matter somewhat more extensively, a full annotation upon the general subject will be found in 137 A.L.R. 263 which annotation has been supplemented from time to time in the supplemental sections of the current A.L.R. volumes under the general heading "War Annotations."

I also acknowledge indebtedness to John L. Barton for an excellent monograph appearing in the October, 1945, issue of the Nebraska Law Review.

There remains only one question upon which I have been able to find little or no definite judicial opinion and it is not unlikely that this question, which thus far has failed to receive much judicial con-

sideration, will before this cycle has come to its conclusion, require such determination.

It will be found that many of the so-called military clauses restrict liability while in the military service "in time of war" or while in the "military or naval service of any country engaged in war." There is always a time lag between the cessation of hostilities and the belated recognition thereof by either a treaty of peace or a formal proclamation by act of Congress or the chief executive. Suppose during this intervening period one in the military service is accidentally killed. Can it be said that such death occurs "in time of war" or can it be said that after enemies with whom we have been engaged in war have laid down their ams and unconditionally surrendered, that we are nevertheless "engaged in war?"

I am not unmindful of the fact that insofar as Public Acts are concerned such as those conferring as war time powers on the chief executive or other official governmental acts, that war is generally not held to have been concluded until the formal signing of a peace treaty or a proclamation by the sovereign that the war has been officially recognized as at an end. However, I am not satisfied that so strict an interpretation would be applied to language contained within an insurance policy where the Courts have consistently demonstrated a zeal to deliberately construe the language employed so as not to defeat without the greatest necessity the indemnity promised. Indeed, that there is strong reason for assuming that a technical meaning will not be ascribed to the reference to "in time of war" or "engaged in war" is strongly indicated by the Supreme Court of the United States in *Aschbrenner vs. U. S. F. and G.* 292 U.S. 80, 78 Law. Ed. 1137, where it is said (at page 1140):

> "The phraseology of contracts of insurance is that chosen by the insurer and the contract in fixed form is tendered to the prospective policy holder who is often without technical training, and who rarely accepts it with a lawyer at his elbow. So if its language is reasonably open to two constructions, that more favorable to the insured will be adopted, (cases cited); *and unless it is obvious that the words are intended to be used in their technical connotation they will be given the meaning that common speech imports.*" (Emphasis our own).

It cannot be denied that if we apply the test such as used by the Supreme Court in the Aschbrenner case and assuming that the reference to war was not used in its technical sense but should be given the meaning which common speech imports, then the war must be deemed to have come to an end with the unconditional surrender of our enemies. Even no less a person than the President of the United States in his address to Congress on September 6, 1945, in dealing with the war, among other things, said:

> "The end of the war came more swiftly than any of us anticipated."

In an editorial in the Weekly Underwriter, an Insurance Periodical, which came to my attention within the last few weeks, among other things occurs a reference to the "war so recently concluded." In the President's Wage Statement of February 15, 1946, he asks that the "powers we found necessary during the war may continue to be exercised wherever necessary in dealing with the economic aftermath of the war." In a feature column in the Chicago Sun dated February 28, 1946, from Mukden, Manchuria, it is, among other things, said:

> "Mukden today, six months after the end of the war, is an empty shell."

Other articles upon this theme might be multiplied indefinitely.

In the recent case of The Elqui, 62 Fed. Sup. 764, the Court gives encouragement to the theory that I am voicing to the effect that "in contracts between private parties * * * it might be said that the term 'for the duration of the present European war' was used in its ordinary or lay concept referring to the cessation of actual hostilities."

In adition to the suggested possible construction of the use of the word 'war' in the clauses under consideration, it might also be suggested that the clause restricting liability while in military service of countries "engaged in war" might well receive a different interpretation than a clause restricting liability while in "military service in time of war." In the first

mentioned clause, i.e. countries engaged in war, the word 'engaged' as will be observed from a consideration of the same word when employed in other exclusionary clauses such as "engaged in aviation," has a rather well defined meaning requiring the actual participation in an enterprise rather than a mere indirect relationship thereto. Hence, a person might be, in our judgment, in the military service of a country after the cessation of hostilities and the unconditional surrender of its enemy and still not be "engaged in war."

It will thus be observed that notwithstanding the growth of the law upon this subject since the paper read to the Association of Life Insurance Counsel in 1918 by Mr. McGivney, there still remains questions which are unanswered and upon which we can only hazard an opinion predictated upon an appraisal of the Court's approach to other related questions.

Needless to say, I should be appreciative of any thoughts or views which you might care to express concerning the troublesome and still unanswered question as to whether a war exclusionary clause remains in effect after the unconditional surrender of our enemies.

The Importance of The Claim Man to The Public Relations of The Insurance Business*

By Frank Van Orman
Newark, N. J.

ONCE upon a time it was the custom to look upon a person who made claim as a suspicious character until he was proved honest. First party claimants —the policyholders—were usualy given the benefit of the constitutional presumption that a man is innocent until proved guilty but the presumption was not applied to third party claimants. It was thought necessary to have a special brand of claim man to handle third party and workmen's compensation claimants. The job seemed to require nimble witted horse traders who knew how to indignantly deny claims in a loud voice and with an overbearing and frightening manner. So special was the type of claim man used on third party claimants that many of our good companies were quick to realize that first party claimants should not be subjected to these men and their wily methods. So other claim men or even underwriters were detailed to handle the policyholders claims and losses. One thing above all else was clear in those days—there was no awareness of the importance of the claim man to the public relations of the insurance business. You can imagine what damage was done to our public relations by this approach to claim handling.

Of course, that was in the old days and there has been a significant change in thinking with respect to the public relations aspect of claim work. I am sure that most of us today give all claimants the same standard of treatment and the same courtesy and I doubt if there are more than a few claim men left who still believe that the insured is always right and the claimant always wrong. There has been a gradual awakening to the fact that what the claim man does or fails to do has a large bearing on the attitude of the public toward our business. It is probably true that the claim man makes the most important impression on the public, good or bad. However, we have not yet reached the millenium and there is still room for improvement especially when our approach to claim handling and our claim practices are viewed from the public relations point of view. I am going to be bold enough to make a few observations looking toward the goal of still further improved public relations through the Claim Department.

It is of the utmost importance that we should invariably "approach the investigation of losses and claims with an unprejudiced and open mind" and be determined to deal fairly with all claimants. These principles should be put into practical working effect and by that I mean they

*Address delivered before National Association Independent Insurance Adjusters, Philadelphia, Pennsylvania, July 7th. 1946.

should be practiced by every claim man as he goes about his daily work. Apparently there are some of us who do not adhere to these principles.

I read just recently in the papers that one company has been suspended by the State of California because of charges by the Commissioner that it failed as a matter of policy to pay the full amounts due to injured workmen under the workmen's compensation law, and forced the uncooperative to sue for their benefits; that it constantly failed to make payments when due. In Massachusetts the Commissioner has proposed an investigation of the handling of auto property damage cases because he charges that some companies make it a practice to pay no more than fifty per cent of any claim no matter what the circumstances. I heard within the week of a company which as a matter of policy refuses to pay any auto property damage case where the repair bill is $50 or less. No doubt these are unusual companies, exceptions among the great majority who deal fairly with claimants but the exceptions are very damaging to our industry public relations. Everyone hears the story of the injured workman who got less than the benefits to which he was entitled, and the man whose car was parked at the curb when struck by a passing auto is loud in his protests when offered but half his repair bill. The public rarely remembers the name of any insurance company so it follows that all of us are blamed.

Strangely enough it is the handling of the small claims to which the public is most sensitive, and of course, there are many more of these. I suspect that much public ill will has been created in the past because of the handling of small auto property damage cases. I suggest it should be the rule that where the insured is solely responsible for the accident, we should pay one hundred per cent of the reasonable value of the repairs. There is simply no legal or ethical basis for a compromise at a lesser amount—in fact, there is nothing to compromise except the time, trouble and expense to which the claimant may be put by forcing his claim to suit and trial. On the other hand, I would not hesitate to refuse payment where the claimant is clearly at fault nor to compromise where it is difficult to decide who was at fault. But where you pay nothing or less than the whole amount you should give a full and clear explanation of the reasons for your action. If you turn the claim down your position must be clear and understandable to the claimant. If so, there will be disappointment but there need be no resentment. Where you pay a compromise amount you should make the claimant understand why you did not pay the whole amount. It is not enough to deal fairly with the claimant—you must sell him that idea. If he does not realize you have paid him all his due, you are in almost as bad a public relations spot as if you failed to deal fairly with him in the first place. A claimant must be convinced that your action is reasonable—that you have done the right thing.

It was said by Mr. Hunter Brown of the National Association of Insurance Agents that too often, to the adjuster it is simply another loss, a common every-day occurence, but in all probability to the policyholder or claimant, it is the event of a lifetime and the treatment he receives will leave an impression, good or bad, as long as he lives. Adjusters must actually feel and show a sympathetic attitude. They should try to put themselves in the place of the policyholder or claimant and treat him as they would like to be treated. I think Mr. Brown is absolutely right. We should recognize that claimants are only human and therefore have a tendency to see things in a light favorable to themselves. This is natural and due allowance should be made. It is not difficult to discuss the facts with the claimant and show him that there are two sides of the story. A reasonable response to his claim will quite likely cause him to offer a reasonable modification, and this is the path of conciliation and eventual compromise. The average man will deal honestly with you if you give him reason to believe that you will deal honestly with him.

I am particularly impressed with the thought that workmen's compensation claimants, no matter how humble, should be treated with all respect and courtesy. The outside office of the compensation claim department should be designed for the comfort and convenience of injured workmen and planned to put him at ease so that he will meet you with a feeling of trust and confidence. The secret of handling workmen's compensation claimants is

to win their trust and confidence. This you will never do by treating them as a class apart. Usually the insurance company is under no legal obligation to explain his rights to the injured workman, but I think it is a great mistake where the claim man fails to give a clear understandable explanation of the benefits to which he is entitled and to tell him fully and frankly about the application of the law to his case. Many of these claimants are uneducated and it requires patience and special consideration to deal with them, but it is well worth it from a public relations view point. In spite of all that has been said on the subject it is still probably true that many injured workmen do not receive their payments of compensation on time. I think this does us great public relations harm. It makes a considerable difference to the injured workman and his family whether he gets his payment on time. It may be necessary for food or other essentials. If we have gained his confidence and trust by our original treatment of him, we will lose it if we fail to pay on time. He is not likely to have much confidence in the claim man if he watches for the letter carrier in vain on the day his payment is due.

Claim payments should be made with all speed consistent with efficient handling. It costs no more to make a payment promptly and I am convinced that there is a surprising amount of good will to be gained by so doing. Overdue payments cost just as much and are likely to create dissatisfaction and irritation. You may think it makes no difference whether you pay a comprehensive claim for a broken windshield today or a month from today but I can tell you that there is an important psychological difference and this is so whether the policyholder needs the money or not. It is good public relations practice to pay bills of doctors and lawyers within two or three days after receipt. Both doctors and lawyers are likely to have a considerable influence on public opinion and special care can well be exercised in dealing with them. Many of our companies are very slow with respect to payments and if something can be done in this connection it would be well worth special effort, even special machines or systems. There is nothing quite so refreshing as a fast payment.

It is my observation that claim men usually take plenty of time to do most everything. People like fast action so it is important that we get down to brass tacks and get down fast. It is no more difficult to complete an investigation within a few days than to take a few weeks and we can make up our minds quickly what to do with the case. I am afraid that we are sometimes inclined to think in terms of passing the case to the next diary date rather than in terms of final decisions. There is a public relations value to be gained by concluding a case with all reasonable speed. It is almost a custom in our business to let the other fellow initiate negotiations looking toward a compromise and in many cases the other fellow sits around and waits for us to make the first move. I think it would be profitable to reverse our custom and step right up with an offer or at least an invitation to trade just as soon as the decision to settle has been made. The public thinks that the insurance companies take advantage of delay wherever possible and I am inclined to think that this is generally true. I think we would please the public by changing to fast decisions and fast action generally. Incidentally, I think that delay is more often than not costly to the insurance companies but I am sure that the public would be better pleased if all unnecessary delays are avoided.

For public relations purposes I consider the policyholder to be a member of the public. I think he is for all practical purposes. When he sends you a report of accident and particularly papers commencing litigation, you should acknowledge to him in language which is reassuring. An accident is an important event in his life and when he is made the defendant in a suit for damages he is naturally disturbed. Send him more than just a bare acknowledgment. Use words which will make him realize that a competent organization of experts has taken over and he can now relax. Also send him a notice when you close out the case, particularly if it involved a suit for an amount in excess of his policy limit. He should learn from you that the case is closed because he may be irritated to discover it from someone else.

I am opposed to reservation of rights letters or non-waiver agreements unless

there are substantial grounds for a disclaimer. Tactical reservations and nonwaiver agreements cause a great deal of anxiety and irritation. It is my observation that ninety per cent of them are eventually withdrawn but only after serious damage has been done. The claim man should not treat these devices lightly. He should realize they are public relations dynamite. Although in most states it is not necessary to show actual prejudice in order to disclaim for failure to report an accident within a reasonable time, I would nevertheless, make it the voluntary rule that there should be no disclaimer unless the delay has resulted in actual prejudice to the company. You will find there are very few cases where a company has been really prejudiced, and the adoption of the proposed rule would practically eliminate public relation damage due to this type of disclaimer.

I hope the day will come when it is the universal practice of all the companies that an insured is never permitted to contribute to a settlement within the policy limit.

So far as coverage is concerned it is my own conception that we occupy a position of trust with respect to the policyholder. I consider it a breach of trust to give him anything less than that to which he is entitled even though he never asks for it and does not know that it is his due. Ours is an intricate and complex business and we do not stand on equal ground with our policyholder because we know all the intricacies of the coverage and he does not. Every reasonable doubt about coverage should be resolved in favor of the insured. In this connection claim men are somewhat inclined to view coverage without referring to insuring intent. It is first necessary to ascertain the insuring intent before one can intelligently pass on a disputed question of coverage. There are cases in which there is no ambiguity in the legal sense—cases where the language is clear but the insuring intent is in doubt. Although such cases might be won in Court, we should also resolve such doubts in favor of the policyholder.

No plan for improving public relations through the Claim Department can be successfuly implemented with the wrong kind of claim men. Take, for example, the adjuster. Much depends upon what he does and how he does it. The public is primarily concerned with the performance of the insurance promise and it is the adjuster who performs that promise. If he performs to the satisfaction of the public we gain good will, otherwise not. I think we can no longer take it for granted that almost anyone can be a successful adjuster particularly if we have public relations in mind. If we expect him to mold public opinion in our favor, we should at least give thought to the qualities and personality traits which are most likely to be helpful in the work of an adjuster. I would select men of character and intelligence, who have initiative, force and emotional stability, men who have a reasonable education and who are courteous, considerate, sincere and persuasive. It would be a mistake to take a man who is unable to quickly adapt himself to other people, to new surroundings and different circumstances. The adjuster in his daily work must be sufficiently hardy to withstand the impact of the varied personalities of the people with whom he does business. We cannot use men who are unable to deal tactfully with unfriendly or belligerent opposition. In short, it takes quite a man to be a successful adjuster. We should recognize this fact and select our personnel accordingly. This may cost more per man than we have been accustomed to paying but it will be worth the price. Incidentally, I think the top executives in the claim organization should give a lot of time and attention to personnel selection and placement. A claim organization will have no more quality as an organization than the quality of the men within it. All the statements of principles from the front office will fall on fallow ground unless the claim men have the capacity for the job. I am trying to sell you on the thought that we should use more scientific means in the original selection of claim men and in the promotion of claim men to jobs up the line.

There is also a job to be done in the re-training and re-education of the claim men just returned from serving in the Armed Forces and there are more young fellows coming into the claim business today than ever before. These men should have the benefit of the most modern ideas on the subject of loss adjustment and claim handling and each should be made to understand that the way he treats the policy-

holder and the claimant can create good will or bad; that in his daily work he represents for public relations purposes not just his department, not just his company, but the whole insurance business.

In the years that have passed the fire and casualty business has enjoyed tremendous growth but still greater growth is ahead of us. I cannot help but feel that there is a greater opportunity for the claim man today than ever before in the history of our business.

Constitutional And Procedural Problems Presented By Proposals In Congress on Tort Liability in Air Transportation

By Stanley C. Morris
Charleston, West Virginia

FOR some years proposals for Federal legislation on the subject of tort liability in the field of aviation have been under consideration. Typical of such proposals are H. R. 532, 79th Congress, First Session, H. R. 4912, 79th Congress, First Session, and S. 1904, 79th Congress, Second Session. As is pointed out in the Report of the Aviation Insurance Law Committee addressed to the meeting of the Insurance Section of the American Bar Association, these proposals follow a pattern involving the following points:

1. Jurisdiction over tortious happenings in the various states is taken from the states and assumed by the Federal government.

2. The burden of proof is, in effect, transferred from plaintiff to defendant by the imposition of liability "unless such carrier proves affirmatively that the injury or death did not proximately result from a failure to use the highest degree of care on the part of itself or any of its servants acting within the scope of their employment."[1]

3. Amounts recoverable are fixed.[2].

The report just mentioned comments upon questions of public policy involved in this type of proposed legislation and points out some of the more readily apparent objections in that field.[2a]. This paper

[1]Quoted from H. R. 532, *supra.*

[2]This attribute of these bills is one of the things tending to "sell" them to both the aviation and insurance industries. A careful consideration of this feature of these bills will, however, demonstrate that the supposed advantages thereof are almost wholly illusory. Legislative history demonstrates that whereas the rule of liability proposed would immediately be accepted by the public as a vested principle never to be divested, the limits of liability could and would be freely and frequently changed and, in all probability, always upward.

[2a]. This report may not soon become available to all the readers of this article. Some of the more pertinent parts of it are as follows:

* * * *

"In our system of government the states have retained the right to control the happenings within their own borders with respect, among other things, to liability for wrongful acts. At present, the law of each jurisdiction controls in connection with liability because of railroad, bus, automobile and aviation torts. * * * * While aviation is comparatively new there appears to be little real justification for differentiating it from other more commonplace methods of transportation. When and if control of liability with respect to aviation is assumed by the federal government it must be recognized that this precedent may be applied to other modes of transportation and to other business which may be classified as interstate. The question here deserving of serious consideration is whether such a transfer is desirable if we are to protect and maintain our present system of government.

"Bills transferring the burden of proof from plaintiff to defendant not only defeat the established law requiring the accuser to prove some fault on the part of the accused (with the assistance provided by law when applicable through presumptive doctrines such as res ipsa loquitur) but have the very practical effect of tremendously increasing the cost of claims through larger settlements and increased litigation. Where liability must be proven it is usually possible to settle claims promptly and at reasonable amounts rather than for the claimant to risk the chance, delay and expense of suit. Where liability is imposed the suit automatically goes to a jury. This encourages unreasonable claims and litigation when such unreasonable demands are not met.

"The limitation of liability to reasonable amounts is essential when liability is imposed, if there is to be any pretense to do justice to both parties. However, any reasonable limitation connected with imposed liability is likely to inflict an unjust burden on one party or the other. Meritorious claims are often worth more than a reasonable average limitation and thus the claimant is denied proper recompense for his loss when just recompense would

(*Continued on bottom next page*)

is limited to a discussion of constitutional and procedural problems raised by these proposals.

CONSTITUTIONAL QUESTIONS

We are, of course, familiar with the Federal Employers' Liability Act[3] and the Longshoreman's and Harbor Workers' Compensation Act,[4] both of which deal, at the Federal level, with the tort liability of employers to employees. The proposal that the Federal Government legislate on the subject of tort liability as between carrier and passenger and between carrier and public generally is, however, novel. From Colonial times public carriers, by surface means, have carried passengers and property. Tort claims, growing out of such carriage, have, uniformly been entrusted to the state courts.

Article X of the Amendments to the Federal Constitution provides:

> "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people."

Those inclined to challenge the constitutionality of the proposed legislation will naturally rely upon the language just quoted, as requiring the continuance of the situation which has obtained in the matter of tort claims between carrier and passenger and carrier and the public heretofore. Proponents of the proposed legislation will naturally rely upon Article I, Section 8, the Commerce Clause. To sustain the constitutionality of the proposed legislation reliance will doubtless chiefly be upon what is sometimes known as the *Second Federal Employers' Liability Act Cases*.[5] It will be remembered that the statute there involved changed, in various vital particulars, common law rules theretofore in effect governing the tort liability of employer to employee. Of the contention that the changes thus legislated violated the Constitution, the unanimous Court said:

> "Of the objection to these changes it is enough to observe:
>
> First. 'A person has no property, no vested interest, in any rule of the common law. That is only one of the forms of municipal law, and is no more sacred than any other. Rights of property which have been created by the common law cannot be taken away without due process; but the law itself, as a rule of conduct, may be changed at the will . . . of the legislature, unless prevented by constitutional limitations. Indeed, the great office of statutes is to remedy defects in the common law as they are developed, and to adapt it to the changes of time and circumstances'."[6]

The Court further held that the legislation there challenged was promotive of interstate commerce in such degree as to be within the power of Congress to enact, saying:

> "The natural tendency of the changes described is to impel the carriers to avoid or prevent the negligent acts and omissions which are made the bases of the rights of recovery which the statute creates and defines; and as whatever makes for that end tends to promote the safety of the employees and to advance the commerce in which they are engaged, we entertain no doubt that in making those changes Congress acted within the limits of the discretion confided to it by the Constitution."[7]

The instant proposals are, however, subject to at least plausible challenge at this point upon a number of grounds such as (a) the contention that it is unreasonable to classify accidents occurring in interstate aviation in a category separate and distinct from accidents occurring in interstate surface travel or in every other type of interstate business and, (b) the contention that fixing limits of recovery in accidents occurring in interstate aviation in amounts different from those recoverable in any other type of accident within the respective states

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[3] 45 U.S.C.A. secs. 51-60.

[4] 33 U.S.C.A. secs. 901-950.

[5] *Mondou v. N. Y., N. H. and H. R. Co.*, 223 U. S. 1, 56 Law Ed. 327, 32 Sup. Ct. 169.

ordinarily be available under present rules of law. The limit can not be high enough to cover such meritorious cases as the tendency is for unmeritorious demands to approach or equal the specified limit and with liability imposed the cost of settling unmeritorious claims—and the great majority of claims do not merit the amount set by any responsible limitation—is greatly increased."

[6] *Mondou v. N. Y., N. H. and H. R. Co., supra.*

[7] *Mondou v. N. Y., N. H. and H. R. Co., supra.*

is unreasonable and violates the legitimate constitutional "classifying" powers of Congress.[8]

Somewhat kindred questions were presented in the cases twice heretofore quoted and were thus disposed of by the court:

> "Coming to the question of classification, it is true that the liability which the act creates is imposed only on interstate carriers by railroad, although there are other interstate carriers, and is imposed for the benefit of all employees of such carriers by railroad who are employed in interstate commerce, although some are not subjected to the peculiar hazards incident to the operation of trains, or to hazards that differ from those to which other employees in such commerce, not within the act, are exposed. But it does not follow that this classification is violative of the 'due process of law' clause of the 5th Amendment. Even if it be assumed that that clause is equivalent to the 'equal protection of the laws' clause of the 14th Amendment, which is the most that can be claimed for it here, it does not take from Congress the power to classify, nor does it condemn exertions of that power merely because they occasion some inequalities. On the contrary, it admits of the exercise of a wide discretion in classifying according to general, rather than minute, distinctions, and condemns what is done only when it is without any reasonable basis, and therefore is purely arbitrary. Lindsley v. Natural Carbonic Gas Co., 220 U. S. 61, 78, 55 L. Ed. 369, 377, 31 Sup. Ct. Rep. 337. Tested by these standards, this classification is not objectionable."[9]

To the present writer it seems that the employer-employee relationship in interstate rail transportation is one thing and that the carrier-passenger and carrier-public relationship in interstate air transportation is quite another, and that there exist very reasonable grounds to doubt the constitutionality of the proposed legislation.

All lawyers are, however, quite familiar with the thought pattern generally prevailing with the Federal Judiciary in these days, in relation to problems arising under the Commerce Clause. We all know that, *quantitatively*, the courts have permitted the Commerce Clause to ingest almost all American business activities.[10]

The instant problem is a different one, namely, whether, *qualitatively*, the carrier-passenger, carrier-public relationship in interstate[11] commerce by air is such as to make it reasonable for Congress to single out that relationship and deal with tort problems arising in it to the exclusion of like tort problems arising in other forms of interstate commerce.

All in all, it seems reasonable to conclude from the decisions, however, that the Federal Courts would hold the proposed legislation, if enacted, to be a valid exercise of the jurisdiction of Congress under the Commerce Clause.[12]

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[8] How widely the recovery limits provided in these bills vary, in the case of wrongful death, from the amounts which may presently be recovered in the courts of the various states may be seen from the "Report of Committee on Casualty Insurance Recovery in Wrongful Death Actions," 13 Insurance Counsel Journal 35, wherein is set out the amounts presently recoverable in all the states. The proposed legislation also provides recovery limits for non-fatal personal injuries. No detailed search has been made by the present writer, but it is believed that no state at present has any such limit fixed by law.

[9] *Mondou v. N. Y., N. H. and H. R. Co., supra.*

[10] The present situation can be no better summarized than by the Seventh Federal Circuit Court of Appeals in a recent case:

> "Thus, while the Supreme Court in N.L.R.B. v. Jones & Laughlin Steel Corp., supra (301 U. S. at page 30, 57 S. Ct. at page 621, 81 L. Ed. 893, 108 A.L.R. 1352), stated 'that distinction between what is national and what is local in the activities of commerce is vital to the maintenance of our federal system,' it appears, from the Filburn case, that the boundary line marking such distinction has been advanced to the point where only a mirage lies beyond. Perhaps the cackle of the farmer's hen as she announces the completion of her daily chore, or the squeal of his pig in its struggle to become a porker, are yet beyond this boundary line, but of this we give no assurance."
>
> *Polish National Alliance of United States v. National Labor Relations Board*, 136 F. (2d) 175.

[11] It is believed that none of the proposed legislation would be applicable to accidents involving strictly intrastate carriers by air. But see *Polish National Alliance of United States v. National Labor Relations Board, supra.*

[12] The constitutionality of the proposed legislation is discussed in detail in "Report to the Civil Aeronautics Board of a Study of Proposed Aviation Liability Legislation," by Edward C. Sweeney, pages 279-320.

PROCEDURAL PROBLEMS GENERALLY

The proposed legislation is implemented by no detailed provisions as to procedure. It is believed, however, that the absence of such provisions is of no particular significance. Doubtless both Federal and State Courts could and would entertain cases brought under the statute if it is enacted."[13]

VENUE

The question of venue is, however, another matter. Since the proposed statute is silent on the subject it is believed that actions could be brought under it where the cause of action arose or, under the rule that tort actions are, in general, ambulatory in nature, could be brought in whatever jurisdiction process could be had upon the defendant. This would mean, in the case of certain commercial airlines that an action could be brought in some jurisdiction on the Atlantic Seaboard as a result of an accident occurring on the Pacific Coast.

Such freedom in the matter of venue for proceedings brought under the statute is believed against sound public policy.

The Federal Employers' Liability Act provides that venue may be had (1) at the residence of the defendant, (2) where the accident occurred, or (3) wherever the defendant is doing business at the time of commencing the action. This innocent appearing provision has been productive of widespread evils which are fast approaching the status of a national scandal. A writer in the February, 1946, number of the Journal of the American Judicature Society describes conditions as follows:

"THE TRAFFIC IN LAWSUITS

A few figures may not be amiss at this point to indicate the proportions to which this problem has grown. Of 214 cases under the Federal Employers' Liability Act pending in Chicago on August 15, 1945, 168 were from outside of Cook County, the normal territorial jurisdiction of the Chicago courts. Only 81 were from the state of Illinois. Of the remainder, 47 were from Indiana, 37 from Michigan, 16 from Ohio, 8 from Texas, 7 from California, and 18 from various other states. On January 10, 1946, The Atchison, Topeka and Santa Fe Railway Company had pending against it in the Superior Court of Chicago a total of 26 cases filed by a single Chicago lawyer in which a total of $1,265,000.00 damages was asked. Of these cases, the cause of action in fifteen of them arose in California, eight in Arizona, and three in New Mexico. Not one of the 26 cases handled by this lawyer arose in Illinois or in any other state in which this particular carrier operates other than in the three western states mentioned, and all, except one case, were brought under the Federal Employers' Liability Act or Safety Appliance Acts. The average distance from the place of occurrence to Chicago is 1888.3 miles, or a total of 49,096 miles in the 26 cases. All 26 cases were filed since September 18, 1945. On September 20, 1945, the claim department of the Illinois Central System reported 164 personal injury suits under the Federal Employers' Liability Act 'imported' from outside jurisdictions and pending in the Chicago courts. The Grand Trunk Western, according to the Detroit Bar Quarterly article previously quoted, had 21 such cases arise in Michigan during 1944, all of which were defended in Chicago and none in Michigan. This is as far as we will go with Chicago statistics, but a letter to the claim department of any other railroad operating out of Chicago will bring a similar story in response. The picture is similar although not quite so bad, in Los Angeles, and the same holds true for various other large cities around the country."[14]

As air travel expands and aviation accidents continue to occur (even though it be, we hope, in a constantly diminishing ratio of accidents to passenger miles flown), similar conditions may and will in all likelihood develop in the air transportation field. If the proposed legislation is to be adopted, it is submitted, that some provision should be included to forestall, to as great a degree as possible, the possibility just stated. This could, it is believed, be accomplished by adding to the proposed

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[13] *Robb v. Connolly*, 111 U. S. 624, 28 Law Ed. 542, 4 Sup. Ct. 544; *Galveston, H. and S. A. R. Co. v. Wallace*, 223 U. S. 481, 56 Law Ed. 516, 32 Sup. Ct. 205.

[14] *Winters, "Interstate Commerce in Damage Suits,"* 29 Journal of the American Judicature Society 135. See also "The 'Exportation' of Personal Injury and Death Claims," 13 Detroit Bar Quarterly 11.

legislation a section reading in substance as follows:

> "Under this Act an action may be brought in a district court of the United States in the district of the residence of the plaintiff in interest at the time the cause of action arose or in which the cause of action arose, and an action may be brought in any State court of competent jurisdiction in the county of the residence of the plaintiff in interest at the time the cause of action arose or in which the cause of action arose. It is provided, however, that in the event process cannot otherwise be had upon the defendant, action may be brought in the District Court of the United States in the district in which the defendant is domiciled or in any State Court of competent jurisdiction in the county in which the defendant is domiciled."

Partnership Insurance

By Byrne A. Bowman
Oklahoma City, Oklahoma

IF PARTNERS have made no plans concerning what will happen to their business upon the death of one of the partners, "complications arise." The death ordinarily dissolves the partnership and the business must be liquidated.

Take for example, two partners, Winchester and Coe. Winchester dies. Under the Oklahoma laws the partnership is dissolved and Coe succeeds to all the partnership property "in trust for the purpose of liquidation," and "shall immediately, in company with the executor or administrator . . . take and furnish to said executor or administrator a correct and full inventory, and a fair and just appraisement of all partnership property . . . after which the surviving partner shall settle the business of the co-partnership." Coe "shall settle the affairs of the partnership without delay, and account with the executor or administrator, and pay over such balances as may from time to time be payable to such executor or administrator. . ." Coe can be required to give a bond.

Coe has absolutely no choice about continuing the business. He has to "wind up" the business by collecting the accounts receivable, selling the firm assets, paying the firm debts, and dividing the cash remaining with the executor, according to the partnership sharing. There may be a choice on the part of the heirs, however, as they might be willing to come in as partners, sell their interests, or buy out Coe's interest, rather than insist upon the statutory liquidation procedure. Power is in the heirs, not in Coe.

In the event of liquidation, Coe is still liable personally for any claims of third persons for damages for negligence or breach of warranty, and for any deficiency in taxes, due to clerical errors, etc.

If the heirs—Winchester's wife and children—should come in as partners, they would probably bring in no experience or business ability. If they were active partners they might not fit in. If they were inactive partners they might draw, or want to draw, excessive shares, not realizing that Winchester's share was due mainly to his excellent services.

Coe might not have sufficient funds to enable him to purchase the interests of the heirs, or, having funds, might have difficulty agreeing on the price.

In the event of liquidation, Winchester's wife could draw no widow's allowance out of partnership funds until the partnership was liquidated and its debts paid, unless it had plenty of cash. Liquidation always shrinks assets. Winchester's widow would suffer by liquidation.

To meet the above problems, "buy and sell" agreements have been entered into by partners whereby upon the death of a partner his administrator or executor becomes bound immediately to sell the deceased partner's interest to the surviving partner for either a stipulated price, or a price to be reached by a method provided in the contract. These contracts have been generally upheld as valid and enforceable except in Alabama, Mississippi, and Rhode Island. Such contracts ordinarily are supplemented by insurance on the

lives of the partners so that when a partner dies the surviving partner can use the proceeds of the insurance for purchase of the deceased partner's interest.

Some years ago, in the community property-law state of Arizona, Ranney Winchester and Tasso Coe formed a partnership to engage in the merchandise brokerage business on a 50-50 basis, each taking out a $10,000 life insurance policy on his own life, premiums being paid by the partnership, it being agreed: "In event of Coe's death his wife or heirs is to receive the face of this policy, and Winchester receives Coe's interest in the business," and it being agreed likewise as to Winchester.

Winchester died and his wife received the $10,000 instead of Winchester's half interest in the business, which business was worth $19,819.39, itemized $11,819.39 in property and $8,000 in "good will."

The court held that the agreement was valid and that Mrs. Winchester could not force Coe to account to her for any portion of the business. (Coe v. Winchester, 43 Ariz. 500, 33 P. (2d) 286).

Now what was wrong with this picture? Why was Mrs. Winchester so contrary? Probably she realized that the money used by the firm to pay the premiums on the policy on Winchester's life was money that he otherwise would have received as his share of profits of the company, and that if he had drawn this money and handled the policy as a private matter, without the agreement, she would have received not only the $10,000 on the policy but also Winchester's one-half interest in the business, which (ignoring the good will) was worth $5,909.69. In other words, if Winchester and Coe had not made the agreement and Winchester had merely bought the policy himself, Mrs. Winchester would have received (if the business could have been liquidated for its book value exclusive of good will) a total of $15,909.69.

Also, it so happened that the investments of the partners were community property, and the profits and reinvested profits were community property, in which each wife (as under the Oklahoma law) owned a one-half interest. Mrs. Winchester owned one-half of Winchester's interest. The court held that inasmuch as Winchester held the partnership interest in his name, he had control of it, and had power to contract concerning it, and that the contract was binding as to Mrs. Winchester. The Oklahoma law is like that of Arizona in stating that community property held in the name of the husband is subject to his exclusive control.

Thus it appears that although a need for partnership insurance exists, the agreement may be drawn so that actually the widow of the deceased partner suffers.

If Winchester had taken out a $10,000 policy on the life of Coe, with Winchester as beneficiary, and had paid the premiums thereon with his share of profits from the firm, and Coe had done likewise as to Winchester, and they had entered into a buy and sell agreement, the results would have been different. When Winchester died Coe would have had $10,000 with which to buy out the interest of Winchester. Coe would have paid the premiums on the policy. This is true business insurance. Mrs. Winchester would be the beneficiary of any policy Winchester might have kept on his own life for her benefit—purely private insurance—and would not have been the beneficiary of any policy of business insurance. As Winchester's executor, however, she would hold a policy on Coe's life, which she could surrender for cash or sell to him, if she wished.

The purchase price Coe would have to pay Mrs. Winchester would be controlled by the terms of the buy and sell agreement.

In a business where the profits have been quite large, compared to the capital invested, that is, where the profits have been due to great amount of good will and personality or advantageous trade connections, the true worth of a partner's interest is much greater than the book value, or appraisal value of physical assets. For that reason the survivor, in order to keep the business intact, should be willing to pay more than the liquidating value, and the widow of the deceased partner should receive more than that value. The average partner will view the matter both ways, for he will want his widow to receive true value.

It is not difficult for the partners to agree on the worth of the business at the end of each year, or arrive at a formula such as the last annual value of net tangible assets, or ten times the annual profits over the last five years, whichever is the greater. Or, they can agree upon appraise-

ment by appraisers selected by the executor and survivor and a third appraiser selected by those chosen.

The agreement can provide that if the proceeds of the policy are insufficient to pay the value of the deceased partner's interest, the survivor shall execute notes for the balance. Conversely, in the event the proceeds of the policy are greater than the value, it can be agreed that the proceeds shall be paid anyway, or that the difference shall be retained by the surviving partner.

It is advantageous to provide that the policies shall be kept by a trust company, and the proceeds received by the trust company; and that no partner shall exercise loan privileges, cash value rights, nor right to change the beneficiary without the consent of the other; but none of these are essential.

The agreement should provide that the estate of the deceased partner should be relieved of all partnership debts. In other words, the survivor guarantees to pay all such debts due, and which may become due in the future.

Although the Arizona court held that the wives would not need to sign the agreement, possible situations of fact under community property laws suggest the precaution that the wives be taken into full confidence and that they sign the agreement.

No Liability

By Dudley O. Emmert
Manitowoc, Wisconsin

THE place of the "office lawyer" in preparation, study, and analysis of casualty cases, is becoming more and more important to insurance companies interested in cutting losses on cases which "boomerang."

The "run-of-the-mill" 90 per cent of the casualty cases reported seem to give little trouble from the standpoint of investigation, adjustment, and settlements. An analysis of loss ratio will probably show that this ratio is substantially increased by the payment of a loss either before or after trial, on which a small reserve was originally entered because some branch or home office adjuster or claims manager made an examination of the file, and marked the case "no liability." If a case is worthy of a file cover, it is worthy of sufficient attention to enable the examiner to write a memorandum covering the points of law on which liability is believed to exist or not exist as the case may be. Whether or not we can reconcile decisions of the courts to our concept of liability, we should remain constantly posted as new cases come forth. To do this means constant research. Any claim man charged with the responsibility of placing a reserve on a case, should be provided with, and should be a regular reader of all recent decisions affecting the area in which he is operating. Such a practice develops a wealth of knowledge and at least partial understanding. Frequently the recollection of a case or principle will mean the difference between success and failure in the proper handling of a claim.

The writer interviewed numerous active claim men and put the following hypothetical case to them. The insured driver with guests in his car is driving on an icy road, attempting to make a curve to the left, of less than forty-five degrees, at a speed of approximately forty miles an hour, and loses control of the car which turns around completely once, heads back off the shoulder and tips over. All occupants immediately leave the automobile. No one is hurt. The occupants look at each other, find that no one is hurt, notice that there is water coming out of the battery from the car, fear a fire, and by common impluse go over to right the automobile. In righting the automobile, one of the guests, the claimant here, cuts his wrist on broken glass in one of the car windows. The glass was broken at the time of the upset. The guest makes claim. What is the liability?

Most claim men concluded that the injuries of the guest was not connected with the accident, even though the insured was negligent in causing the upset of the auto-

mobile. Such was not the ruling of the Wisconsin Supreme Court in the recent case of Hatch vs. Smail, 249 Wis. 183. The lower court instructed the jury "negligence is the cause of a collision or injury when it alone produces the same or cooperates with some other cause in producing it jointly as a natural result. An intervening act of a human being which is a normal response to the stimulus of a situation created by the negligence of another does not prevent an injury received during such act from being the natural result of the original negligence.

"The question is, if you feel from the evidence that the injuries of the plaintiff, Leonard Hatch, were received while doing something after the accident itself, then you must decide whether the action in which the injury was received was a normal response to the stimulus of the situation and emergency created by the accident. It is for you to determine from all the evidence in the case whether the accident and injuries were the natural result of the negligence, and, if so, then of what and whose negligence?" The Supreme Court said that the court had properly instructed the jury. The plaintiff received the jury's award and the Supreme Court affirmed the judgment.

The court cites Restatement 2 Torts, Sec. 431, as follows: 'The actor's negligent conduct is a legal harm to another if (a) his conduct is a substantial factor in bringing about the harm * * * *."

In the comment on this section, it is said: "a. . . The word 'substantial' is used to denote the fact that the defendant's conduct has such an effect in producing the harm as to lead reasonable men to regard it as a cause, using that word in the popular sense in which there always lurks the idea of responsibility, rather than in the co-called 'philosophic sense,' which includes every one of the great number of events without which any happening would not have occurred. Each of these events is a cause in the so-called 'philosophic sense,' yet the effect of many of them is so insignificant that no ordinary mind would think of them as causes.

"b. In many cases the question before the court is whether the actor's negligence was in fact the cause of the other's harm—that is, whether it had any effect in producing it—or whether it was the result of some other cause, the testimony making it clear that it must be one or the other, and that the harm is not due to the combined effects of both. . . . It is only where the evidence permits a reasonable finding that the defendant's conduct had some effect that the question whether the effect was substantial rather than negligible becomes important."

In the Hatch case, an earlier case of Kramer vs. Chicago, M. & St. P. R. Co., (1937) 226 Wis. 118, 276 N.W. 113, is cited and discussed. In the Kramer case, the train crew had attempted to connect a string of cars, but the automatic coupling was defective, and the connection was not made. In the second attempt to make the coupling, which also failed, the impact drove three of the cars southward away from the engine. The plaintiff and another employee attempted to set the brakes. The other employee succeeded in reaching the brakes first, and jolting caused by the stopping of the train, caused the plaintiff to fall on the track, causing the injuries complained of. The contention was made in that case that it was the act of the second employee in setting the brake that caused the plaintiff's injuries. The Supreme Court says in the Hatch case, "This court, however, after a careful analysis, applied the rule set out in section 443, Restatement, Torts, and in the comment already referred to." Sec. 443, Restatement, 2 Torts, reads "an intervening act of a human being or animal which is a normal response to the stimulus of a situation created by the actor's negligent conduct, is not a superseding cause of harm to another which the actor's conduct is a substantial factor in bringing about."

Ability to evaluate cases is not only an art developed through experience, but is more and more a science, the success of which depends upon a constant study of the rapidly changing field of tort law, together with sound analytical judgment in applying stare decisis to cases not yet in litigation, in the hope that litigation can be avoided. If litigation is not to be avoided, it is comforting to have some idea of where we will end. "An ounce of prevention is worth a pound of cure."

The Law Affecting Aviation Liability Claims

By George W. Orr
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THE impact of war on aviation has been tremendous. This has made itself felt in both technical advances and in public interest. The technical advances have been far reaching, not only with respect to airplane design, but include developments in equipment such as turbo-jet engines, radar and other navigational aids. This will inevitably result in the carriage of passengers and goods faster, safer and cheaper, hence an increase in both domestic and international flying. Some indication of the proportion of this increase may be judged from the fact that air line passengers have already increased from 1,876,000 in 1939 (our last normal pre-war year) to 7,700,000 in 1945—before wartime progress had yet been available to commercial air transportation. Public interest has been increased by the wartime training of tens of thousands of pilots and technicians who are potential civilian flyers, not to mention an increase in civilian student certificates from 30,000 in 1939 to 70,000 in 1945.[1]

The interest of lawyers in such a development in any industry, is of course, that there will be a corresponding impact upon the law and the practice of law. Our job as lawyers is to see that our proven system of justice is protected against the hysteria of popular and political interest and that the protection of judicial procedure is maintained to the end that justice may be available to all by due process of law. Our job as individuals is to take notice of the growth of this new industry and to equip ourselves for professional participation as the occasion demands. It is to this latter interest—that of the lawyer as an individual—that this article is directed.

After some twenty years of experience as an active aviation operator and as a specialist in liability law affecting aviation, it is the writer's opinion that several misconceptions exist in many legal as well as lay minds with respect to aviation and aviation law. The impression is fairly general that there is something mysterious about flying and that aviation law is a specialty beyond the knowledge of the average competent general practitioner. Of course, neither is true. The airplane uses laws of nature just as definite and scientifically dependable in "defying gravity" as the boat uses in floating upon the water. The legal principles I use most in my work in aviation law are those I learned when I received my LL.B. some thirty-five years ago—when the airplane was a little known and undeveloped curiosity.

The truth is that liability has been tinkered with little as yet in connection with aviation and that the common law rules of negligence—with which every lawyer is familiar—generally apply. There is a considerable body of law built up by our courts applying these principles, but an adequate discussion of such cases cannot be included in a general paper of this character. A comprehensive compilation is found in U. S. Aviation Reports,[2] the 1944 volume of which digests most cases to that year. The idea I wish to convey is that aviation law is not a special branch but an application of the general law with which we are all familiar and quite as accessible as the law relating to any other industry.

Before discussing the exceptions, it may be in order to dispel some more misconceptions.

The fact that airplanes cross many state boundaries in a short time is not the basis of conflict of law. It is well established that the law of the place of accident controls and that law is available to all.[3] There is some variation in the laws of some of the states but in my experience in handling more aviation claims perhaps than any other man, there has been no conflict. We all agree that the uniformity of federal control is desirable as to safety regulations and the economic regulation of interstate airlines, an objective already accomplished by the Civil Aeronautics Act of 1938[4]—but this is no precedent for the necessity of uniform

[1] CAA Journal, January 15th, 1946.

[2] United States Aviation Reports, Inc., 2301 N. Charles St., Baltimore 18, Md.

[3] Beal Conflict of Laws, Vol. 2, Sec. 3841, p. 129.

[4] 1938 USAvR 327; 49 U.S.C.A. 1944 Sup., 208.

liability laws which can only be accomplished at the serious cost of taking control away from the states.

Another imaginary difficulty is that in some cases all aboard an airplane are killed in an accident and because there are no eye witnesses, it is difficult to prove negligence. This same situation is applicable to alleged wrongful death in other industries but there is better opportunity to prove liability in connection with aircraft accidents than in any industry I know because of the meticulous records kept by aircraft operators, the government records and the public hearings incident to serious aeronautical accidents. The plaintiff has access to all facts known to the defendant. There appears to be no justification for subjecting aviation to a different standard of liability than that required of other industries, some of which are in direct competition.

A study of decisions concerning aviation reveals that our established law and judicial process is quite capable of giving justice. In the words of the Committee on Aeronautical law, in its 1942 report to the New York Bar Association: "Considering the success or failure of the common law rules of liability by examining the reported cases over the last thirteen years, there is little, if any, evidence to indicate that substantial injustice has been done as between operators by air and the traveling or general public. There is no reported aviation decision where the common law rules have been judicially condemned as insufficient or inadequate to accomplish justice between the parties: on the other hand . . . . the courts seem to have found the principles of common law to have sufficient flexibility to work out an equitable solution to the particular problem."

The exceptions to the application of common law rules of negligence are: (1) Land damage statutes, (2) guest statutes, and (3) the Warsaw Convention. It may be noted at this point that on the basis of court constructions so far, the motor vehicle laws of the various states have been held not applicable to aircraft.

(1) Land damage laws (based on Section 5 of the so-called Uniform State Law for Aeronautics)[5] impose absolute and unlimited liability on the owner (and certain liability on the operator) for property damage and/or injury to innocent third parties on the surface caused by the operation of aircraft or objects falling therefrom. Unless changed during the past year, the jurisdictions having such laws are: Delaware, Hawaii, Indiana, Nevada, New Jersey, North Carolina, North Dakota, South Carolina, South Dakota, Tennessee, Vermont, Wisconsin, Montana and Wyoming, the liability being aplicable only to forced landings in the last two mentioned states. Maryland and Georgia make proof of damage prima facie evidence of liability. The law with regard to aircraft liability in Pennsylvania is found under Title 2, Sec. 1469, 1472 and 1473, 1944 Pocket Supplement to Purdon's Pennsylvania Statutes Annotated.

(2) California[6] and South Carolina[7] have guest statutes applicable to aviation, the former providing that there shall be no action for death, injury or loss unless injury results from intoxication or wilful misconduct and the latter unless the act was intentional or caused by heedlessness.

(3) Briefly, the Warsaw Convention[8] is a "Convention for the Unification of Certain Rules Relating to International Transportation by Air" (its proper name); its application is determined[9] by the contract of transportation and not by the place of accident—when between two nations adhering to the treaty, or from one adhering nation to a destination in that same nation, if there has been an agreed stopping place in another nation whether an adherent or not. It places primary liability on the carrier for injury to passengers,[10] baggage and/or goods[11] unless the carrier can affirmatively prove that it and its agents have taken all possible necessary measures to avoid the damage[12] (or in the case of baggage and goods, that the damage was caused by an error in piloting or navigation),[13] and limits recovery: for death or injury of passengers[14] to the present U. S. Currency value of $8,291.87; baggage and goods[15] to

[5]1936 USAvR 376.

[6]Sec. 11½, Art. 151, Deering General Laws of Cal.
[7]Sec. 5908, 1936 Sup. to S.C. Code of 1932.
[8]49 Stat. 3000 (1934); 1934 USAvR 239.
[9]Ch. I, Art. 1 (2).
[10]Ch. III, Art. 17
[11]Ch. III, Art. 18.
[12]Ch. III, Art. 20 (1).
[13]Ch. III, Art. 20 (2).
[14]Ch. III, Art. 22 (1).
[15]Ch. III, Art. 22 (2).

$16.58 per kilogram (2.2046 lbs); and $331.67 for objects of which the passenger takes charge himself,[16] unless the passenger affirmatively proves that the damage was caused by wilful misconduct,[17] in which case there would be no limit. The limitation for bringing an action is two years.[18]

Our international air commerce is developing rapidly and this development will continue until it becomes of importance to an ever increasing number of lawyers. For this reason I am discussing it at some length even though perhaps less practical to a majority of lawyers at the moment than decisions in other fields of aviation law. As a matter of fact, the subject is not as remote in practical interest as appears on the surface, as many lawyers who do not consider their practice in the field of international law at all are being confronted with the problems growing out of international air transportation—and finding that quite different principles of law are involved. This, of course, is in those cases to which the so-called Warsaw Convention is applicable—and it can be applicable in the most surprising places, on a purely intrastate flight, let us say, from Philadelphia to Pittsburgh. I prepared an introductory article on The Warsaw Convention which was published in the March 1945 Virginia Law Review.[19]

There have been several recent decisions of interest in connection with the Warsaw Convention which may be appropriately discussed in conection with this relatively new subject.

The Wyman vs. Pan American[20] case was concluded in 1945. This case involved the death of a passenger in 1938 on a passage contract from San Francisco (USA) to Hong Kong (a British colony), both adherents to the Warsaw Convention. The trip required several days with overnight stopovers at a number of points, all under U. S. sovereignty and the accident occurred on the leg of the flight between Guam and Manila, both under U. S. Sovereignty. In other words, the plane had never entered foreign territory and the intended immediate destination, Manila, was still under USA jurisdiction. Further, the plane disappeared over the no-man's-land of the high seas, so the accident or whatever caused the failure to reach port, was assumed to have occurred over the high seas. The many interesting legal questions arising in such circumstances are immediately apparent.

The carrier claimed that the passage was subject to the Warsaw Convention and the writer immediately offered to pay the maximum limit of liability provided, since the claim justified such a settlement. This was refused and the case tried in the New York State Supreme Court, New York County in June 1943, the decision being that the flight was subject to the Warsaw Convention and that recovery was limited to the U. S. equivalent of the limit provided therein. The decision was unanimously affirmed without opinion by the Appellate Division[21] and again unanimously affirmed without opinion by the New York Court of Appeals.[22] Certiorari was denied by the United States Supreme Court, April 23rd, 1945.[23]

Since this is the first case involving the Warsaw Convention which has been considered by the highest state and federal tribunals, it will probably be classed as the leading American case. In view of the many legal questions so ably presented by counsel for both sides on the several appeals, it is regrettable that we have no opinions from the higher courts. However, Judge Schreiber's decision settled several important points: (1) The rights of the parties are fixed by the Warsaw Convention. (2) The Convention becomes a part of the law of the land. (3) The rules of the Convention were made a condition of the ticket. (4) and in any event are so made under the rules themselves. (5) Warsaw Convention rules are applicable only to international flights (Art. 1) and (6) raise a presumption of liability on the part of the carrier (7) for injury or death of a pasenger (8) limited to approximately $8,300 under present U. S. gold standard, except where the carrier is guilty of "wilful misconduct." (9) There was no proof of wilful misconduct, indeed of any negligence connected with or a proximate cause of the accident (establishing that affirmative proof is

[16]Ch. III, Art. 22 (3).
[17]Ch. III, Art. 25.
[18]Ch. III, Art. 29.
[19]Vol. 31, No. 2, p. 423.
[20]1943 USAvR 1; 181 Misc. 963; 43 N.Y.S. (2nd) 420. 293 N.Y. 878.
[21]267 App. Div. 947; 48 N.Y.S. (2nd) 459.
[22]293 N.Y. 878; 59 N.E. (2nd) 785; 1943 USAvR 1.
[23]324 U.S., No. 1 (advance sheets), page V.

necessary). (10) The Warsaw Convention rules permit a recovery that otherwise might be impossible for want of proof. (11) The original place of departure and the final destination is specifically controlling despite breaks in travel routes. (12) Compliance with the law (by the carrier) is always to be assumed unless the contrary is proven. (13) The right to bring a death action is purely statutory. It did not exist at common law, and depends upon the existence of the statute creating a right of action at the place where the "force impinged" causing the injuries. (14) No new substantive rights were created by the Warsaw Convention and all its rules are well within the framework of existing legal rights and remedies. (15) The right to recover must depend upon some statute. (16) The New York Law can have no application as the injury and death did not occur within the state. (17) The federal "Death on the High Seas Act"[24] is applicable to airplane accidents on the high seas. (18) As interest is not provided in that Act, no interest may be allowed on verdict.

Another Warsaw Convention decision of considerable interest is Garcia (Diaz) vs. Pan American,[25] as it confirms the decision reached in the leading English case, Grein vs. Imperial Airways.[26] In this case Manuel Diaz bought a ticket from New York to New York with Lisbon, Portugal (not an adherent) the other end of a round-trip ticket—one of several agreed stopping places under foreign jurisdiction. The plane was wrecked in landing near Lisbon, fatally injuring Mr. Diaz. Suit was brought and a motion by the plaintiff for an order striking defenses based on the Warsaw Convention was heard by the N. Y. Supreme Court, Westchester County, September 8th, 1944.[27] The motion was denied, the Court holding that the transportation was explicitly within the meaning of "International Transportation" as defined by the Convention. In answer to the contention that Lisbon was the destination of the outbound trip, which should be considered separately from the return trip, the Court held that the severability of the flights was not the criterion for measuring its international character and that the terms of the contract alone control. On appeal the Appellate Division unanimously affirmed the order. In an interesting and able opinion by Judge Hagarty, the Court holds that as a treaty the Warsaw Convention is part of the law of the land, overriding state law and policies and that its provisions supercede the usual doctrine that the right and measure of recovery are governed by the *lex loci* and not by the *lex fori*. Further, that the treaty is self-executing since the provisions do not require implementation and may be enforced in the same manner as if enacted by statute.

Another interesting case in the U. S. District Court for the Southern District of N. Y. is Indemnity Insurance Company vs. Pan American, et al.[28] This was a motion by the plaintiff insurance carriers challenging the affirmative defenses based on the Warsaw Convention. This was much the same question, now in federal court, which was decided in the Garcia case, supra, by the New York state courts. The action was based on the same accident February 22nd, 1943, near Lisbon, Portugal—a non-adherent to the Convention. Recovery is sought for damages suffered by the father and mother of Tamara Swan, who died in the crash, in connection with compensation paid in accordance with an award to said parents. The points of argument were: (1) That the Warsaw Convention was unconstitutional because it encroaches on the power of Congress to regulate commerce. To this the court found that there was no authority for questioning the validity of a treaty duly ratified in the manner prescribed by the Constitution on the ground that it did not receive the approval of both Houses of Congress and that the treaty did not encroach improperly on the power of Congress to regulate commerce. (2) That the Convention was inoperative because it is not self-executing and has never been implemented by legislation. To this the court states that whether a treaty is self-executing depends upon its terms, whether they call for further action or whether they are enforceable without legislation. Judge Rifkind states that as he reads the treaty,

[24] Title 46, U.S. Code Sec. 761.

[25] 269 App. Div. 287; 235 CCH 1380 (Commerce Clearing House Aviation Law Service); 1945 USAvR 39.

[26] (1937) 1 KB-50; 1936 USAvR 211.

[27] 235 CCH 1366.

[28] 235 CCH 1373; 58 F. Supp. 338 (S.D.N.Y.); 1945 USAvR 52.

and particularly the provisions pleaded that limit liability, he construes them to be self-executing. (3) That being inoperative, the treaty cannot be effective as a contract between carrier and passenger. To this the court found that since the treaty is operative, the argument fails. "The public policy against contracted limitation of liability by common carriers[29] must bow to the overriding policy of the treaty."[30] (4) "The argument that the treaty is invalid because it deprives plaintiff of its property without due process is rejected. Statutes for the limitation of liability are no novelty." (5) To the argument that a requirement for written notice of the claim within thirty days is invalid as against public policy the court decides that such defense cannot be stricken as a matter of law.

Leaving the Warsaw Convention subject, and in my effort to call attention to relatively unfamiliar litigation affecting aviation, the case of Jones vs. Northwest Airlines[31] decided by the Washington Supreme Court, April 17th, 1945, is of interest beyond the question of contract it decided. A flight was cancelled because of weather conditions and plaintiff sued for breach of contract. The defendant pleads in defense its tariff regulations, required and approved by the Civil Aeronautics Board, to the effect that flights could be cancelled at any time it deemed advisable and that the airline is not responsible for failure of aircraft to depart or arrive on scheduled time. In holding for the defendant, the court said "His ticket was sold subject to tariff regulations with which he was charged with notice. . . . The tariff regulations under which the appellant purchased his ticket were available for his inspection at respondent's ticket office. In buying this ticket, the appellant bought it subject to the regulations. Respondent could not sell it on any other basis without violating the law for paragraph 483 of the Civil Aeronautics Act, 49 U.S.C.A., 1944 Sup., 208, requires the filing of these rules and regulations and forbids a carrier from departing therefrom."

The significance of the above decision is that it is the first we have had upholding the legality of the rules and regulations filed by all airlines with the CAB and hence applying the great volume of law already decided in connection with the filing of like tariffs by railroads and other surface carriers with the ICC. This includes the limitation of liability on checked baggage and other property—a subject of increasing interest as air travel increases.

Finally, there is some confusion as to (1) just what the Civil Aeronautics Authority is and (2) as to the effect of civil air regulations issued by that federal Authority on aviation liability.

(1) The Civil Aeronautics Authority was created by the Civil Aeronautics Act of 1938. Under the Reorganization Act of 1939 the President reorganized the Authority and Public Resolution 75, approved June 4, 1940, provides that Reorganization Plans No. III and IV shall take effect on June 30, 1940. Briefly, the Civil Aeronautics Authority was divided into two organizations, one being the Civil Aeronautics Board, which among other things, issues civil air regulations and investigates accidents through its Safety Bureau, and the other, the Civil Aeronautics Administrator, who, among other things, is the administrative agency to carry out the regulations of the Board. The term Civil Aeronautics Authority is now used only in referring generally to the whole federal control of aeronautical affairs.

(2) There is presently no federal law (other than the Warsaw Convention) having to do with aviation liability to passengers, goods or the public. Section 701 (e) of the 1938 Act, supra, specifically provides that no part of any report or reports of the Board or Authority relating to any accident, or the investigation thereof, shall be admitted as evidence or used in any suit or action for damages growing out of any matter mentioned in such report or reports. This is only fair, as this agency has nothing to do with determining liability, its investigations is for a totally different purpose—safety regulation—it received inadmissible evidence without regard to the safeguards of law and its conclusions which may be interpreted as affecting liability are often unsustainable by legal evidence.

About the only way the civil air regulations of the CAB would affect liability is that compliance with or violation of regulations might be submitted as evidence, if material, in legally determining liability.

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[29] Conklin vs. Canadian Colonial Airways, 266 N.Y. 244; 1934 USAvR 21.

[30] U. S. vs. Pink, 315 U.S. 203, 231.

[31] 235 CCH 4056; 1945 USAvR 57; 157 P. 2d 728.

"Traffic Deaths Can Be Prevented"

By Lt. Col. Franklin M. Kreml, *Director*
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VITAL action programs that produce a reduction in traffic accidents and deaths must be evolved in every city and state in the nation. Safety leaders are in agreement that there is no easy way to bring about such programs. Only through unceasing effort in the application of time-tested formulae, hard work, a sound appraisal of traffic conditions, plus the solid backing of an informed public can this be accomplished.

In many ways our safety efforts in the past have been commendable and worthwhile. But it is quite obvious that they have been inadequate. The problem is too vast to be successfully resolved by beating a tom-tom, by crying like a circus barker, or with the technique of the tent meeting huckster who hawks salvation by nightly repetition of the discomforts of hell. The time has passed for appealing to the emotions of our people, of trying to bring them face to face with our highway horror and its costly inadequacies, to sicken them until they resolve to drive with sanity and caution. They know the facts. They have been told the story almost every day of their lives. It is not in their nature to become more perturbed, more emotionally excited about traffic than they are now. The reason for this, as explained by my friend Sidney J. Williams of the National Safety Council, is that the average man has only so much time and energy to be divided among his personal affairs and pressing local, national and world-wide problems. He needs not so much to be stirred up further, but rather to settle down into specific courses of action. His mind has been pried open by emotional appeals; it needs now to be filled with usable information.

The time has come to stop selling "Safety" in general and concentrate instead on developing and winning support for a specific program for each state and city. I do not urge decreasing our appeal for public support, but that we now present an intelligent and constructive program that community and state business and governmental leaders can endorse with confidence.

We have, fortunately, the basis for such a program in the reports of the President's Highway Safety Conference held last May. It reiterates, in part, the standard program for control that the Traffic Division of the International Association of Chiefs of Police and the Northwestern University Traffic Institute have recommended since 1936.

The Conference *Action Program* has provided America with a master plan, based on sound educational, enforcement and engineering techniques, by which states and communities can achieve maximum safety and efficiency in highway transportation. In addition, the event has had the effect of making people safety-conscious on a truly national scale.

I cannot emphasize too strongly the importance of the *Action Program* to the nation. We have in our grasp the opportunity that many of the people in the traffic control field have devoted their lives to preparing. For the first time in history a part of the load borne by enforcement, the most immediate and important aspect of traffic control, is being distributed with equity to those other agencies without whose cooperation and intense support all traffic control programs fail.

Twenty-eight governors have scheduled state conferences to develop ways and means of putting the *Action Program* into effect, and more meetings will be held in other states. If conferences have not been held in your city or state, and if reception of the program has lacked the enthusiasm and concerted effort necessary to its unqualified success, it then should be cause for grave concern to you and to all responsible citizens in your community.

In the past ten years nearly 320,000 Americans were killed in traffic accidents. Some 11,000,000 others were injured. Resulting economic losses, including property damage, wage loss, medical expense and overhead cost of insurance, totalled approximately 15 billion dollars.

The fact that in the face of this grim

record there were many important gains in highway safety merely bespeaks the magnitude of the accident prevention problem in the most highly motorized nation on earth. For the accident curve normally tends to follow close on the heels of the travel mileage curve. Thus the peak mileage year of 1941, when travel aggregated 333 billion miles, was also the blackest year in number of fatalities, setting an all-time high of 40,000 traffic deaths.

Motor vehicle travel in the United States has multiplied six times within the last two decades. It is significant that in 1946, with some two million fewer vehicles on the road than the 34,400,000 operating in 1941, that vast mileage of that top-pre-war year was more than equalled.

The 1946 traffic death toll for the U. S. was approximately 34,000. This is more than 5,000 higher than the 28,600 killed in 1945 when wartime restrictions limited travel.

Motor vehicle registration reached approximately 32.5 million at the end of 1946. It is estimated that by 1956 registrations will increase to approximately 45 million, with a probable 55 million by 1962.

The increase in registration will result in greater exposure to accidents, making our current heavily traveled thoroughfares more dangerous. Accidents exposure will rise materially; possibility of two-car collisions grows, not in direct proportion to rising registration, but by the approximate square of vehicle mileage. We can expect 1947 accident totals to exceed the 40,000 killed in the peak year of 1941. The problem is severe and will grow worse.

Improved official action, courageously employing proved, modern techniques, is a vital necessity if this great accident potential is to be dissipated. This is especially true of traffic policing. No matter how flawless a modern road system, and no matter how skillfully blended into it are other factors, the entire structure of traffic control still depends upon the vital element of police enforcement. Improvements in this important function of control will result in the most immediate and substantial reduction in traffic accidents. Such improvement takes advantage of the large present establishment of police departments, with more than 100,000 men immediately available for this work.

Evidence of the relation between enforcement and the accident rate is shown in the following table which makes a comparison of death rates per 10,000 registered motor vehicles and enforcement indices* of six cities in the top three population groups for 1945:

	Traffic Deaths Per 10,000 Registered Vehicles	Enforcement Index
Detroit	4.0	21.2
Baltimore	8.9	5.8
Houston	4.2	31.7
San Antonio	8.6	5.1
Wichita	1.3	16.4
Peoria	7.3	5.7

As examples of the effect of enforcement on the rates of individual cities: In 1937 Cleveland, with an enforcement index of 3.4, had 247 traffic deaths; the following year, an index of 13.4 and 130 fatalities. Evanston, Illinois had an index of 1.5 and 12 traffic deaths in 1928, but an index of 18.6 and two deaths in 1935.

Our police officials are, fortunately, increasingly alert to the problem now developing. They know that well organized supervision of traffic by trained personnel inevitably results in substantial reduction in accidents. They recognize their responsibility to provide such supervision.

But anxious as most of them are to deal effectively with the problem, they need and are demanding help—help in planning, organization, training, and in the development and establishment of sound doctrines and techniques in their departments; help in effecting personnel and activity re-organization which will give them the greatest result in the employment of their present facilities.

Both the Traffic Division of the International Association of Chiefs of Police and the Northwestern University Traffic Institute have felt the currently developing interest in traffic control and accident prevention. Programs of these twin organizations, both established in 1936, have been reorganized in order to meet the increasing demands for assistance made by traffice administrators.

The Institute is a non-profit organization financed primarily by the Automotive Safety Foundation, Washington, D. C., and

*Enforcement index is the number of convictions for hazardous moving violations per personal injury accident.

the Kemper Foundation for Traffic Police Training, Chicago. It is located on the campus and functions under the jurisdiction of Northwestern University. During the past ten years it has trained nearly 1,500 police officers as specialists in traffic control and accident prevention.

The Traffic Division of the IACP, which shares certain staff personnel and office space with the Institute, also was organized in 1936 to serve police departments in the field. This service to city and state police departments falls into two main classifications: survey and installation. The survey work comes first—to get the facts and to form a basis of agreement and understanding between city and state officials and the Traffic Division representatives. Then follows the installation phase during which the real service is performed.

When a city or a state requests assistance, experienced IACP field representatives are sent to study the organization, personnel strength and type, the training and selection program, the records system, equipment and the methods of assignment and duty. They survey the handling and disposition of traffic cases by the court, including the work of the prosecutor. The traffic laws of the city or state are carefully reviewed. Their objective is to examine each factor that may have a bearing on the efficiency of the department's traffic functions.

Following completion of the field study, a survey report is prepared making complete appraisal of the present traffic program and containing recommendations which will raise both the quality and quantity of enforcement to an effective level. If the officials accept the Traffic Division's recommendations, field representatives are assigned to the department to carry them out.

Reorganization begins immediately. Using the survey as a blueprint, staff men simultaneously begin a complete overhauling of the accident records system and start training clerks in the filing, maintenance and use of this important information. An analytical unit is created, and, almost at once, record study becomes routine, the conclusions of such analyses being used as bases for selective program direction, as in the assignment of patrols in keeping with the times and places of highest accident frequency.

Other staff men, at the same time, begin an extensive examination and interview procedure to find the officers and men best fitted for assignment to a series of intensive technical schools to be conducted for such functions of the reorganized Traffic Division as the accident investigation bureau and enforcement (motorcycle) unit. While these men are in school, additional motor, investigative and office equipment is secured, and departmental rules, orders and policies are revised so that the new activities may begin as soon as the men are qualified.

Finally, the staff carries its work into the local courts, providing among other things as expeditious a disposition of the increased volume of cases as possible in such a manner as to prevent, by an auditing system, any irregular disposition (fixing) of traffic cases. Routines are established whereby the prosecutor is supplied all materials necessary for successful case presentation in advance of trial, assuring a higher conviction rate and generally improved case handling.

Following completion of these major phases of the job, several weeks (in larger departments) are spent in carefully observing and checking all phases of the new program to assure operational smoothness and correct application of principles. For example, monthly systematic reassignment of motorcycle and accident investigation officers is carefully checked to assure that assignments by hours and areas coincide closely with the recorded accident experience by hours and areas. Citations are checked, by area, to determine whether enforcement attention is being focused on those violations which predominate as accident causes in that area. If these principles of selective enforcement are not being followed, necessary orders or administrative changes are secured.

Such installations require from three months (Greenwich, Conn.), to one and a half years (Detroit), during which time promising officers are sent from the department to the Northwestern University Traffic Institute to be trained in the traffic police administration course, returning in time to take places of executive responsibility in the new program.

Follow-up work, which is extended on a continuous basis after the installation has been completed, includes regular consulta-

tions and review of progress. In some cases, as in Oakland, Calif., because of the serious disruption of the entire department by the war, a resurvey is made, and some of the original work redone, such as restaffing, retraining and realignment of the organizational structure.

The value of good traffic police programs is revealed in the records of those cities which have installed such programs with IACP Traffic Division assistance.

In almost every case success has followed the installation efforts—such that it can be stated confidently that reductions of 30 to 50 per cent can be secured in one to two years, if responsible local cooperation can be had.

There are many outstanding examples in IACP installation records. Cincinnati's traffic deaths were brought down in three years from an annual toll of 129 to 73; in Memphis deaths dropped from 48 to 31 in the first year; in 1936 and 1937 Cleveland had 463 fatalities; the installation completed, Cleveland's toll was cut to 245 in 1938 and 1939. More importantly, the rates stayed down. For example, Detroit experienced 2,971 deaths in the nine-year period ending January 1, 1937. The major phase of the installation was completed late in 1937. In the nine years since, Detroit has totaled 2,011 deaths. Its rate per 10,000 registered motor vehicles has gone down steadily, despite a marked increase in registration and motor vehicle use.

These are not isolated cases. Since economic and population disturbances may have statistically affected any or all of the cities, the IACP has developed statistically validated comparisons based upon trends of cities, comparing the experience of installation cities with the trend of all cities in the group, employing averages which are geometric means of index numbers.

Table I gives the traffic death experience of all IACP installation cities in the 250,000 to 500,000 population group and compares them to the normal established by all other cities in the group. Even such a highly conservative comparison indicates unmistakably the marked downward trend resulting from the installation work.

But the IACP traffic program does not end with installation and survey work. A highly important and productive activity is the establishment of a regional program of traffic officer training in cooperation with variously strategically situated and interested universities. The field staff participates in the instructional, research and publications program of the Traffic Institute. The two organizations took leadership in the development of short course (two-week) training schools at the University of California, University of Alabama and Yale University. Interrupted by war, this program now is being re-established with New York University substituted for Yale. The ultimate objective is the development of a series of autonomous regional schools offering an extensive program of research, publications and training similar to the program of the Northwestern University Traffic Institute.

The post-war upsurge in traffic deaths is a reality. The Northwestern University Traffic Institute and the Traffic Division of the International Association of Chiefs of Police are prepared to make every effort to assist police departments in meeting this problem with intelligence and with courage. Every organization and every citizen must cooperate with the police and with government officials in assuring that provisions of the *Action Program* of the President's Conference, which includes necessary enforcement, engineering and educational reforms, are adopted.

Table I

TRAFFIC DEATH EXPERIENCE OF ALL IACP INSTALLATION CITIES

Compared to Normal Established by All Other Cities
Population Group—250,000 to 500,000—Motor Vehicle Deaths Per 100,000 Population
Years After Installation

Cities	1	2	3	4	Avg.
Atlanta, Ga.	—46%	—24%	—28%	—47%	—37%
Cincinnati, O.	—54	+ 5	—24	— 1	—22
Columbus, O.	+24	—36	— 8	+ 7	— 7
Indianapolis, Ind.	—28	+18	— 3	+25	— 1
Louisville, Ky.	— 9	—17	—38	—16	—20
Memphis, Tenn.	— 5	+ 9	—56	—13	—21
Oakland, Calif.	—16	0	+31	— 9	+ 2
Portland, Ore.	+10	+16	—13	—20	— 3
All Cities	—19	— 6	—21	—12	—14
All Except Columbus and Indianapolis	—22	— 3	—25	—19	—18

Compiled from data in Accident Facts, National Safety Council. Installation in Indianapolis was not standard. Averages are geometric means of index numbers.